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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 470

ALTHEA G. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Northern District of California, Southern Division (R. 86–92; Pet. Br. App. i–vi), is reported at 105 F. Supp. 208. The opinion of the Court of Appeals for the Ninth Circuit (R. 289–303; Pet. Br. App. vii–xxvii) is reported at 215 F. 2d 800.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1954 (R. 304). The petition for a writ of certiorari was filed on Decem-

ber 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States is liable, under the Federal Tort Claims Act, for the negligent acts of a soldier which occur when the soldier is seeking personal recreation in an army vehicle while he is off duty and away from his base on a pass.

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act, the Civil Code of Guam, and the Army Regulations are set forth in the Appendix, *infra*, pp. 15–17.

STATEMENT

Petitioner, a civilian employee of a construction firm, sustained personal injuries when a parked auto in which she was sitting with a friend was struck by an army vehicle driven by Corporal J. R. Seabourn. The accident occurred at about 10:30 p. m. on the night of March 3, 1949, on a road near a beach area in the Town of Agana on the Island of Guam. Fdg. II, R. 98. Seabourn, who was a supply clerk assigned to a Headquarters Base Service Detachment stationed on the Island, was off duty that day (R. 28, 56; Fdg. III, R. 99). He had obtained an appropriate pass to leave the army base for the day (R. 28, 56; Fdg. III, R. 99).

Accompanied by two other soldiers, Private R. C. Schmidt and Corporal R. K. Benson,[1] Seabourn spent the afternoon at various taverns drinking beer (R. 28, 32, 45; Fdg. III, R. 99). The three men returned to the base at about 7:00 p. m. and while there, Sergeant Stiles, a member of Seabourn's company, gave Seabourn a trip ticket for a ¾ ton weapons carrier (R. 28, 87–88; Pet. App. x). This ticket had been made out to a driver named Cabera, a soldier who also worked with Seabourn (R. 65, 57–58). The ticket discloses that the vehicle had been requested by a Lieutenant W. R. Werb, and that the vehicle had been issued to Cabera shortly after 8 a. m. for "Official Business."[2] Listed on the ticket are the various official points to which the vehicle was driven that day, *e. g.*, from the Motor Pool to Base Supply, to Warehouse 1, to 374 Maintenance, etc. Neither Seabourn's nor Stiles' name appears on the ticket, nor is Seabourn's use of the vehicle in any way indicated.[3]

[1] Cpl. R. K. Benson was sometimes referred to as Cpl. R. K. Vincent during the trial and is so named in the opinion of the court below. It was stipulated that both names refer to the same person (R. 238).

[2] The trip ticket (R. 65) is set out in the margin of the opinion below (R. 292; Pet. App. xi).

[3] Seabourn testified that it was common practice for trip tickets to be "passed around" among the men working in his group, regardless of the name on the ticket (R. 28, 88). Schmidt, his drinking companion, testified that a vehicle with a trip ticket issued for official business was also used for recreation (R. 19, 88). Army Regulations, however, pro-

By means of this trip ticket, Seabourn obtained the vehicle and he and his two companions then drove to the Enlisted Men's Club where they drank more beer as well as some champagne, and then they decided to "go for a ride" (R. 87, 28, 32–3; Fdg. IV, R. 99). Some time prior to the accident, Seabourn let his companions out of the vehicle and drove off alone (*ibid.*). There was testimony that Seabourn was then "very drunk" (R. 239, 29, 38, 52). Seabourn himself remembered nothing further until the next morning when he awoke beside a road (R. 29, 52, 87, 99).

Petitioner brought suit against the United States under the Federal Tort Claims Act (28 U. S. C. 1346 (b), 2671 *et seq.*) in the United States District Court for the Northern District of California, alleging that Seabourn was driving negligently while acting in the line of duty (R. 3). These allegations were denied in the Government's answer (R. 12). Upon trial of the case, the district court found that the accident was caused by Seabourn's negligence. The court found, however, that Seabourn was off duty and away from his base on a pass when the accident

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vide that motor vehicles may be used for official business only (A. R. 700–105, par. 26*c*, *infra*, pp. 16–17), or, by "special direction of the commanding officer," for transporting personnel in connection with "authorized, organized, and supervised recreational * * * activities" (*id.*, par. 28*b*). They provide that vehicles are to be dispatched for specific tasks (*id.*, par. 29*d*) and are to be operated only by properly dispatched drivers with valid permits (*id.*, par. 22*a*).

happened; that he had obtained unauthorized possession of the vehicle; that he was not using it for any purpose authorized by Army Regulations, but, instead, was on a frolic of his own, and therefore was not acting within the scope of his employment. R. 98–100, 86–92. Accordingly, judgment was entered in favor of the Government (R. 101–102).

On appeal, the Ninth Circuit reviewed the facts independently, made equivalent findings, and affirmed the judgment below (R. 291–293, 304; Pet. App. x–xii). In doing so, the court declared that the Tort Claims Act recognizes that the status of a soldier or sailor is different from that of a civilian employee of the Government; that federal rather than state law is paramount in determining the scope of employment; that, while principles of *respondeat superior* alone are applicable in determining the Government's liability for torts of its civilian employees, in the case of military personnel Section 2671 of the Act (*infra,* p. 16) requires additionally that the tort of the serviceman occur while acting in the line of military duty (R. 298–303; Pet. App. xix–xxvii).

ARGUMENT

1. The basic objective of the petition is to obtain a further review of what is primarily a question of fact, *viz,* whether the driver was acting within the scope of his employment when

the accident happened.[4] This issue and the underlying facts were resolved against petitioner by both courts below. The trial court found that Seabourn was clearly on a "frolic of his own," was not using the vehicle for any purpose authorized by his employer, but, instead, was using it "as he might his private automobile in seeking personal entertainment" (Pet. App. vi). The Court of Appeals, reviewing the evidence independently, found that Seabourn's use of the vehicle while off duty and while seeking personal recreation was not in furtherance of any military or other Government business, nor was he motivated by any purpose to serve the Government's interest (*ibid.*, xii); he was simply and "beyond any doubt * * * out on a wild frolic" (*id.*, xxiv). In the absence of a very exceptional showing of error, the concurrent findings of two courts below will not be reviewed by this Court. *Comstock* v. *Group of Investors,* 335 U. S. 211, 214. Here, not only is there no such showing of error, but on the contrary the record is so decisive on these facts as to preclude any different finding.

2. Both courts below applied the proper legal standard of "scope of employment". Regardless

[4] Scope of employment, like the question of negligence, is to be determined by the trier of facts. *Washington Gas Light Co.* v. *Lansden*, 172 U. S. 534, 544–545; *Hill Transp. Co.* v. *Everett*, 145 F. 2d 746, 747 (C. A. 1); *Restatement of Agency*, § 228 (2); cf. *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 477–478.

of whether resort be had to federal authority or to state court decisions,[5] it is elementary that a servant's negligence will not be imputed to his master if that negligence occurs when the servant is on a frolic of his own.[6] It is everywhere recognized that liability under the doctrine of *respondeat superior* is predicated upon the fact that the servant is conducting his master's affairs; the master is therefore not responsible for the acts of the servant while the servant is pursuing only his own ends. *E. g., Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 221; *Kish* v. *California*

[5] "The Tort Claims Act adopts the local law for the purpose of defining tort liability, not for the purpose of determining the relationship of the Government to its employees." *United States* v. *Sharpe*, 189 F. 2d 239, 241 (C. A. 4). The employment relationship between the Government and its employees, especially members of its armed forces, "is 'distinctively federal in character' " and is "governed exclusively by federal law" (*Feres* v. *United States*, 340 U. S. 135, 143, 146); "the scope, nature, legal incidents and consequences of the relation * * * are fundamentally derived from federal sources," and they "require uniform national disposition rather than diversified state rulings" (cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305–306, 307).

[6] As to federal cases, see *e. g.*, *King* v. *United States*, 178 F. 2d 320 (C. A. 5); *United States* v. *Lushbough*, 200 F. 2d 717 (C. A. 8). As to state cases, see *e. g.*, *Kish* v. *California S. Automobile Assn.*, 190 Cal. 246; *Hanchett* v. *Wiseley*, 107 Cal. App. 230; *Gousse* v. *Lowe*, 41 Cal. App. 715.

The accident in this case occurred in Guam. Sec. 2338 of the Civil Code of Guam (*infra*, p. 16) adopts the usual *respondeat superior* doctrine. *United States* v. *Johnson*, 181 F. 2d 577, 580 (C. A. 9). Decisions of the California courts are authoritative in Guam since this section is derived from the California Civil Code. *Ibid.;* Pet. App. p. x, fn. 1.

S. Automobile Assn., 190 Cal. 246, 248. Unless the servant is engaged in his master's affairs, liability will not attach to the private employer although the employer habitually allows his employee to use his vehicle or even if he purchases or maintains the vehicle entirely for the use and convenience of the employee. *Restatement of Agency*, § 238, com. b. "In other words, if the servant used the automobile of his master not in furtherance of his master's business, but for his own individual use, he is merely a borrower and the relation of master and servant not existing during the course of such use, the master is not liable for his acts." *Kish* v. *California S. Automobile Assn., supra,* 190 Cal. at 249. There is no liability under the Tort Claims Act when the government employee is only a borrower or a bailee of the government vehicle. *United States* v. *Lushbough,* 200 F. 2d 717 (C. A. 8); see *United States* v. *Hull,* 195 F. 2d 64, 67 (C. A. 1).[7]

[7] Thus, petitioner's contention that Seabourn had "permission" to use the vehicle is wholly irrelevant once it is found that he was using the vehicle for his personal use rather than to further his master's affairs.

Even though a servant's recreational activities may be of indirect benefit to his master (presumably every employer wants his employees to be healthy and to have high morale), if those activities are not controlled by the master and have no substantial relation to the servant's duties in furthering the master's business, no liability attaches to the master for injuries to third parties resulting from such recreational activities. *Matter of Wilson* v. *General Motors Corp.*, 298 N. Y. 468; *Harrington* v. *Border City Mfg. Co.*, 240 Mass. 170; *Rogers* v. *Allis-Chalmers Mfg. Co.*, 153 Ohio St. 513.

Accordingly, if we accept petitioner's contention that in measuring the Government's liability for the torts of its military personnel the normal master-and-servant principles apply without reference to the "line of duty" concept,[8] it is plain that the elementary rules of *respondeat superior,* coupled with the finding of both courts below that Seabourn was not engaged in government business but was on a frolic of his own, is completely dispositive of petitioner's claim. Neither in principle nor in result does the decision below depart from this rule. On the contrary, it was expressly accepted.[9]

3. The court below did go further. It suggested that, to impose liability upon the United States for the negligence of its military personnel, the Act requires not only that they be acting within the scope of employment under *respondeat superior* principles, but also that they be acting in

[8] As noted above, the Tort Claims Act provides that, as to military personnel, scope of employment "means acting in line of duty" (Section 2671, *infra*, p. 16).

[9] The appellate court said (Pet. App. xxiv–xxv): "Reduced to their simplest terms, the facts of this case show beyond any doubt that Seabourn was out on a wild frolic when he injured appellant; * * * that he was not then * * * on military business of any kind. And if resort be had to the California cases * * * which deal with the liability of a private employer (under the respondent superior doctrine) we suggest that it would bankrupt the most exuberant imaginative powers to envision Seabourn's criminal conduct as an activity which a private employer 'should reasonably have expected would be done,' or that such conduct was 'serving his master.'"

line of military duty.[10] Petitioner urges that the addition of this "line of duty" qualification conflicts with *United States* v. *Campbell,* 172 F. 2d 500 (C. A. 5), certiorari denied, 337 U. S. 957.[11] But since the decision below barring recovery falls decisively within, and was also based upon, normal *respondeat superior* principles, wholly apart from the added qualification (see *supra,* pp. 6–9), it is unnecessary to reach the purported point of conflict.

In any event, the *addition* of a limiting military qualification is not inconsistent or in conflict with *Campbell.* There, the claimant had relied upon

[10] That the court below regarded the "line of duty" proviso of Sec. 2671 as an added requirement rather than as a substitute for "scope of employment" is apparent from the whole tenor of the opinion. Thus, it spoke of the "line of duty" concept as a "modification of" the master and servant doctrine rather than as its replacement (Pet. App. xxii–xxiii); however, it tested Seabourn's conduct by normal *respondeat superior* rules, examining the purpose of his trip, his personal motive, the absence of his employer's supervision and control over his conduct, etc. (see *id.*, xxii, xxv–xxvii). See, *e. g.*, fn. 9, *supra*, p. 9.

[11] The other cases mentioned by petitioner do not discuss the "line of duty" proviso. *Costley* v. *United States*, 181 F. 2d 723 (C. A. 5), related to the discretionary function exception of the Act; *Hubsch* v. *United States*, 174 F. 2d 7 (C. A. 5), certiorari dismissed, 340 U. S. 804, involved primarily an evidentiary problem and the "permissive use" doctrine; *McConville* v. *United States*, 197 F. 2d 680 (C. A. 2), certiorari denied, 344 U. S. 877, involved a personal deviation from an authorized and official trip. Compare cases in fin. 13, *infra*, p. 12.

the "line of duty" concept for the purpose of *extending* the Government's liability for the conduct of military personnel beyond the bounds of normal *respondeat superior* principles. It was argued that the words "line of duty" should be given the same broad interpretation under the Tort Claims Act as they are given in statutes conferring benefits on servicemen and their dependents for an injury or death incurred during the serviceman's military service.[12] The Fifth Circuit rejected that argument, stating that its acceptance would "subject the Government to fantastic claims of liability having no relation to the doctrine of respondeat superior, as it is known and applied, in determining the liability of private persons" (172 F. 2d at 503).

[12] Congress has broadened the "line of duty" concept in such legislation to reward servicemen for the sacrifices caused by their separation from civilian life, and for the understandable and desirable purpose of making benefit payments to such servicemen and their dependents in practically all situations, except where the injury or death for which benefits are claimed (1) was the proximate result of the serviceman's own misconduct or (2) occurred while he was deserting or was under confinement by sentence of a court. See Act of September 27, 1944, 58 Stat. 752; 32 Op. A. G. 12 (1919). Thus even injuries sustained by a soldier in the course of his remunerative employment for a private concern while he was on furlough from his military duties have been held to have been incurred in the "line of duty" for the purpose of awarding him pension benefits (Decisions of the Administrator of Veterans' Affairs, Vol. I, p. 147).

The *Campbell* decision is representative of a group of cases[13] which recognize that Congress did not intend to incur *broader* liability when the injurious act was inflicted by a serviceman than when due to the wrongful conduct under similar circumstances by other kinds of federal employees. The decision below, on the other hand, suggests in its alternative holding that the liability may perhaps be *narrower, i. e.,* in those circumstances where the serviceman is not acting in strict line of military duty, even though were he a civilian employee he might be regarded as within the scope of employment. *Campbell* and the other cases (fn. 13) do not touch this proposition.

4. Nor does the decision below present an intra-circuit conflict with *Murphey* v. *United States,* 179 F. 2d 743 (C. A. 9), involving an accident which occurred during a soldier's recreational trip. In that case, pursuant to Army Regulations 700–105, par. 26*c* (*infra,* pp. 16–17), the vehicle had been assigned by special direction of the commanding officer for an organized and supervised recreational activity; here, on the other hand, Seabourn's use of the vehicle during his entire trip was without any Army sanction, and, instead, as both courts below found, was for a frolic of his

[13] *E. g., United States* v. *Eleazer,* 177 F. 2d 914, 918 (C. A. 4), certiorari denied, 339 U. S. 903; *Rutherford* v. *United States,* 168 F. 2d 70 (C. A. 6), affirming *per curiam* 73 F. Supp. 867 (E. D. Tenn.).

own.[14] Neither the *Murphey* decision nor the seamen cases on which it relied compel the conclusion, which petitioner urges (Pet. 16), that a soldier's personal pursuit of pleasure in an army vehicle while he is off duty on a pass is, as a matter of law, within the scope of army employment.[15] While off duty, a soldier "is at liberty to go where he will" and "to employ his time as he pleases" (*United States* v. *Williamson,* 23 Wall. 411, 415); he is "subject to the control of no one but himself" (*United States* v. *Sharpe,* 189 F. 2d 239, 241 (C. A. 4)); his relationship to the Government while off duty is "not analogous to that of a soldier * * * performing duties under orders" (*Feres* v. *United States,* 340 U. S. 135, 146).

[14] In *Murphey* the court said (179 F. 2d at 745–746): "We are not holding that in any case where the soldier is on a frolic of his own he can make the government liable simply because he there found entertainment." As the court below pointed out (Pet. App. xvii), the instant case falls within this area excluded by *Murphey.*

[15] In *Murphey,* the court relied (erroneously, we submit) on cases such as *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, which hold that, for purposes of determining whether the owner of a vessel is liable to a seaman for wages, maintenance, and cure when the seaman is injured ashore, shore leave is to be regarded as "not merely a personal diversion," but as part of the business of sailing of ships (*ibid.* at 734). This type of case is based upon historic and unique admiralty doctrine—the seaman is a "ward of the admiralty" (*Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 782)—and has no relevance to the question of the owner's liability to a third person for the torts of his seamen. That liability is controlled by the doctrine of *respondeat superior* (see *Workman* v. *New York City, Mayor, etc.,* 179 U. S. 552, 565).

So far as third persons were concerned, Seabourn was, while off duty, virtually in the same relationship to the Government as any private servant is to his private employer on his day off. As we have pointed out, the law does not recognize vicarious liability in those circumstances.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1954.

APPENDIX

A. Sections 1346 (b), 2674 and 2671 of Title 28 U. S. C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 982, 983), provide in pertinent part:

SECTION 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

SECTION 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

SECTION 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

* * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

B. Section 2338 of the Civil Code of Guam provides as follows:

2338. Unless required by or under the authority of law to employ that particuiar agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

C. Army Regulations 700–105 (30 June 1948) provide in pertinent part as follows:

26. *Use of vehicles.*—* * *

b. Motor vehicles * * * will be operated * * * only if properly dispatched on WD Form 48 (Drivers' Trip Ticket and Preventive Maintenance Service Record), issued by the dispatching motor pool or under such instructions as the appropriate

commander under existing authority may direct.

c. Motor vehicles will be used only for official business, including the special uses listed in paragraph 28.

* * * * *

28. *Special uses.*—Motor vehicles, when available without detriment to other official business * * * may be used by special direction of the commanding officer for the following purposes:

a. Authorized athletics.

b. Transporting personnel, including entertainers and party guests, and supplies and equipment in connection with authorized, organized, and supervised recreational, welfare, and morale-building activities.

* * * * *

29. *Motor pools.*—* * *

d. Vehicles will be dispatched from pools to perform specific tasks, and will not be permanently allocated or assigned to any agency or individual, except as prescribed herein.

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